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Supreme Court of the United States.

Brief of Hand for Appellee

THE CANADA SUGAR REFINING COMPANY,

Filed April 1, 1899.

Libellants and Appellants,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,

Respondents and Appellees.

BRIEF OF APPELLEES.

CLIFFORD A. HAND,
Counsel for Appellees.

Supreme Court of the United States.

THE CANADA SUGAR REFINING COMPANY,
Libellants and Appellants,

vs.

THE INSURANCE COMPANY OF NORTH AMERICA,
Respondents and Appellees.

Brief of Appellees.

The facts established by the record, upon a just and reasonable construction of them, are few and indisputable. Without making them the subject of formal preliminary statement, they will be referred to in the following points in so far as is supposed to be necessary.

I.—*The insurance obtained by the appellants from the appellees, was explicitly against nothing short of total loss of profits of the cargo of sugar on board the ship "John E. Sayre," which sailed from Iloilo, February 10th, 1893, bound for Montreal in Canada.*

(1.) At the time of obtaining their insurance from the appellees, the appellants had already obtained from another underwriter, the Atlantic Mutual Insurance Company, insurance upon the cargo itself (See policy Ex. 9, p. 66). And the valuation of the pound sterling, at $7.-50, had included a profit in this cargo insurance.

(2.) The terms of the insurance, obtained by the appellants from the appellees, were embodied in the written certificate (Ex. 4, p. 40). Thereby it was certified that

the appellees "insured under policy No. 117, 407, made "for Robert Hampson, $15,000, on profits on cargo sugar "against total loss only, valued at sum insured, shipped "on board the Br. ship 'John E. Sayre,' at and from "Iloilo to Montreal, and the loss, if any, subject to the " terms and conditions of the policy has been made pay- " able to the order of Canada Sugar Ref'g. Co. L't'd. on " surrender of this certificate."

(3.) The policy to which this certificate attached, is Ex. 11 (p. 55). The provision of chief present importance is what is known as the "Sue and Labor Clause," of almost universal use and cognizance, to the effect that "In case of any loss or misfortune, resulting from any " peril insured against * * * the acts of the assured " or assurers, or of their joint or respective agents, in " preserving, securing or saving the property insured in " case of danger or disaster shall not be considered or " held to be a waiver, or acceptance of abandonment." (P. 55, fol. 89.)

(4.) There is no room for ingenious liberality of construction, in behalf of the assured, under such a contract of insurance. It was with merchants keenly alive to their own interest and skillful in caring for that interest. Its very brevity and simplicity made its meaning too plain for misunderstanding by them. The words, " total loss only," were too expressive to admit of such misunderstanding.

(5.) Whether this sharply defined limitation of the risk, undertaken by the appellees, was by reason of unwillingness of the appellants to pay a premium, suited to an unrestricted risk, or by reason of the speculative character of the subject of insurance, does not concern us. The contract is as it was made between intelligent and competent parties, and is to be respected and interpreted according to its plain purport.

II. *There was in truth no total loss of the insured profits.*

(1.) Although the "John E. Sayre" was stranded at the western end of Newfoundland opposite the mouth of the St. Lawrence River, yet a substantial part of her cargo was at once saved, dry and in good condition, and transshipped up the river to Montreal, its original port of destination. It was there delivered to, and received by, the appellants and without a dollar of expense to them. The means by which this was accomplished, are referred to in Point IV. For the moment the simple and indisputable fact is all that need be stated. The bills of lading, for this transhipment, were introduced in evidence by the appellants and are found on pages 66, 67 and 68. The bill "A. W. H. 17," (fol. 105), was for "4583 sacks *dry* sugar, 153 tons 12 cwt. 0 qrs. 12 lbs." The bill "A. W. H. 18," (fol. 106), was for "4596 sacks *dry* sugar, 154 tons 2 cwt. 0 qrs. 13 lbs." And also for "670 sacks wet sugar, 20 tons 18 cwt. 2 qrs. 20 lbs." The bill "A. W. H. 19," (fol. 107), was for "175 sacks wet sugar, 5 tons 9 cwt. 1 qr. 23 lbs."

(2.) The result was that, of their cargo of sugar, 9179 sacks, weighing something over 307 tons, reached the appellants at the port of destination, sound and uninjured, and was there taken into possession by them to be sold or disposed of at their pleasure. The same was the case with the 845 sacks of wet sugar. Without, however, reckoning these last into the account, it is evident that what thus reached the port of destination and the appellants, in good order, was about one-eighth part of the entire original cargo.

(3.) Nothing in the record shows, or tends to show, that the profits, on the portion of the sugar thus saved, were not realized by the appellants. The intervention of the cargo underwriter, Atlantic Mutual Insurance Com-

pany, is subsequently and separately dealt with in this brief. Mr. Drummond, the President of appellants, testified that no claim for total loss was made against this cargo underwriter or, as he prefers to express it, "that the sugars were received at their insured value" (fol. 27, pages 16 and 17). And this is understood by us to have gone so far as to include even the wet part of the sugar. In other words, evidently the dry sugar exceeded the insured value of it by enough to at least compensate for any loss on such as was wet.

(4.) The appellants, moreover, in their dealings with the cargo underwriter, allowed and paid the original freight from Iloilo, less the trans-shipment freight (P. 17, fol. 28).

(5.) It would seem to be in the nature of an arithmetical conclusion that whatever profit was ever capable of being realized, from so much of the sugar as arrived at Montreal in good condition, was entirely available for realization by the appellants after it came into their possession. There is no pretense in the record of even a fall in the market. Nor is there any pretense, according to our recollection, that what had occurred had wrought the least prejudice or loss to the profits, anticipated by the appellants, from so much of the sugar as thus came to them. How they escape the inference that this part of their profit was saved, it is impossible for us to comprehend.

III.— *Wherever cargo reaches its destination in sound condition, the profits of or upon the cargo are, in the eye of the law, treated, under a valued policy, as having also reached their destination. If the cargo be not wholly lost, the profits cannot be wholly lost. In other words, loss of the cargo is regarded as a prerequisite of loss of profits, independently of any state of market.*

(1) The question, whether or not the possibility of

profit in case of safe arrival is provable or necessary to be proven under a valued policy, was fully considered and decided in the negative in Patapsco Ins. Co. vs. Coulter (3 Peters, 222). The Court could not perceive why, if "profits be the mere excrescence of the principal, as some "judges have said, or incident to or identified with it, as "others have said, the loss of the cargo would not carry "with it the loss of profits. This rule has convenience and "certainty to recommend it." The same principle was announced in the early case of Loomis *vs.* Shaw (2 John. Cases 36), where it was said that "profits are necessarily "incidental and subject to the final disposition of the "goods on which they are expected to accrue. The "plaintiffs in the present case have actually received five-"eighths of the goods and appropriated the proceeds to "their own use. Whether they yielded a profit or sold at "a loss does not appear. It is not material since the "plaintiffs chose to accept them at London and take the "benefit of the market there. They are therefore entitled "to an average loss of three-eighths only." It will be observed that Loomis *vs.* Shaw hinges entirely upon loss of cargo, regardless of whether or not there would have been a profit in case of safe arrival, and regardless also of the fact that the cargo failed to reach its destination, which fact was treated as having been waived by acceptance at an intermediate port. It is also to be noted in that case that there was no limitation of the insured risk to total loss only. If there had been such a limitation, the logic of the case would have led to entire defeat of the claim instead of to an apportionment of profits betweeen cargo saved and cargo lost.

(2.) The two essential elements of the insurance in question were the valuation of profits at $15,000 and the stipulated immunity of the underwriter from liability from anything less than total loss. These two provisions are con-

sistent with, and interdependent upon, each other. They both fit the case of entire loss of cargo and cannot be made to fit the case of partial loss of cargo. The underwriter could not reduce the sum, payable by him, by showing that the profits would have been less or nothing in case of safe arrival. He could not be required to pay the sum insured, or any part of it, because of partial loss.

(3.) The theory of the appellants involves the absurdity that they would have been entitled to demand $15,000 from the appellees provided they could show that, through peril of the sea, they had failed to realize that much of profit on their venture. Logically pursued, this theory would justify recovery of the $15,000 if any proportion, however small, of the cargo had been lost or damaged in the course of the voyage. Their contention is for $15,000, with no credit for profits actually realized by them, from so much of the cargo as escaped destruction, or even injury. At the same time, they contend that this escape of part of the cargo in no wise defeats their claim for total loss.

IV.—*The intervention of Atlantic Mutual Insurance Company, as cargo underwriter, in the saving and forwarding of the cargo, is not available to the appellants to convert into a total loss of cargo and profits, what was in truth partial loss of each and both. Assuredly this intermediation inter alios could not and did not create a liability of the appellees.*

(1.) Mr. Drummond (in the teeth of objection by the appellees) was permitted to deliver a judgment as to what were the legal rights of his company, the appellants, to the effect that "practically the sugar was in the posses-" sion of the Atlantic Mutual Insurance Company, was " their property; but as its coming to Montreal would " have brought it to a place where practically there was

" no market for it, we were *obliged, or considered our-*
" *selves entitled*, to deal with it apart from any question
" of legal rights on an equitable basis. We consequently
" arrived at a settlement as nearly mutual as we could"
(page 18, fol. 29). This deliverance of Mr. Drummond is probably connected with his statement that, if the sugar "had come to a market like this (New York), it could " have found buyers, but in Montreal there was practically " only one buyer" (page 17, fol. 27). In other words, the appellants controlled the Montreal market and were therefore in position to do as they pleased about accepting the sugar. Other parts of his testimony are given the same coloring, of the idea that there was a species of repurchase of the sugar by way of settlement with the cargo underwriter, or its agent, Mr. Darragh. It is all purely colorable or inferential, without the statement of a single fact to support or justify it. Nor can it be necessary to say that such opinions or characterizations are not testimony.

(2.) The dealing with the sugar and the correspondence about it are fully set out in the record. They forbid the hypothesis that, even as between the appellants and their cargo underwriter, there was ever so much as the semblance of an abandonment or surrender of the property by the former to the latter. All that was done by, or on behalf of the cargo underwriter, was manifestly done under the " Sue and Labor " clause of the policy, and was, in the language of the cargo policy (Ex. 9, p. 66), among those " acts of the insured or insurers in recovering, saving and " preserving the property insured in case of disaster;" none of which acts were to " be considered a waiver or " acceptance of an abandonment, to the charges whereof " the said Insurance Company would contribute according " to the rate and quantity of the sum herein insured."

(3.) When the disaster occurred, the *master* arranged

with local fishermen for the saving of cargo by them at one-half of what was saved. (Pages 21 and 22, fols. 34 and 35). This arrangement having resulted in the removal from the wreck and placing in store, and in safety on the shore, of the portion of the cargo, which was ultimately forwarded to Montreal, Mr. Pike, as representative of the cargo underwriter, arrived and took in charge the settlement of the expense accounts. It thus appears that the extrication of the cargo from danger was, by the master of the ship, in the discharge of his duty as agent of all whom it might concern, and with no apparent reference to either underwriter or owner.

(4.) The correspondence, between the appellants and their cargo underwriter appears on pages 40, 41 and 42 of the record (Exs. 5, 6, 6X, 7 and 8), and is sufficintly expressive. On 7th July, 1893, the underwriter acknowledged advices of the disaster, and stated that assistance had been forwarded. On 10th July, the underwriter gave to the appellants their latest information, "that all the "sugar between decks has been saved, and we hope to "have it sent to Montreal." That is to say, the forwarding to appellants was treated as matter of course. On 14th July, the appellants telegraphed as to offers for the sugar, and received the answer that no sale had been authorized; that the master had agreed to give the salvors half, but that all was to be forwarded to Montreal, and the salvage was to be paid in money. By letter of same date, the cargo underwriter explains the talk about sales, as probably due to effort of salvors, and adds that the offer of cash "was *suggested by the master* and acceded to by "us." Shortly afterward appeared the bills of lading, (Exs. 17, 18 and 19, pages 66, 67 and 68), for transshipment of the cargo to Montreal. In these bills of lading, the shippers inserted were the disbursing agents, Harvey & Co., and the nominal consignees were the cargo underwriter. The form thus adopted was perfectly consistent

with the original idea of the forwarding of the cargo to its port of destination by, or at the expense of, the cargo underwriter, free of salvage charges. The final direction of the cargo underwriter as to transshipment, on 31 July, was to "consign sugar to Canada Sugar Refining Com- "pany, Limited, Montreal." (Page 63). The mere form of consignment, by the agents was of course not intended to alter the substance or intent of this explicit direction. There was acceptance and the bills of lading were promptly endorsed by the cargo underwriter, and delivered accordingly. Indeed, as this endorsement was signed by the officer in New York, the bills of lading went to Montreal in that condition, and ready for such delivery.

(5) As between the appellants and their cargo underwriter, some act of abandonment was requisite to the vesting of title in the latter. There was no such act or anything squinting toward it. The underwriter stepped in promptly and took upon himself the burden of the expense account (which by-the-by must ultimately fall upon him) and saw to it that the cargo was hastened forward. He exercised no act of ownership, such as would have been the sending of the sugars to New York where, as the appellants tell us, there was an open market for them. On the contrary, he pushed them forward to Montreal where the appellants claim to have been themselves the only market. From beginning to end there was obviously no thought, in the mind of either party, of anything other than delivery of the goods to the appellants.

(6) The policy is believed to furnish conclusive evidence on this subject (Ex. 9, p. 66). On 25th August, there was an advance of $100,000 "on account" or with certain notes added, $110,000. On September 8th, there was the final settlement, in which $142,748.81 was allowed for the loss and the balance of it, $32,159.07 (after deduction of the previous advance) was paid. The settlement was

clearly and unmistakably a settlement upon the basis of partial loss and nothing else, and was so recorded in the policy itself.

(7) Even if the case had been otherwise, it would not have been competent for the cargo underwriter and the assured to throw their partial loss settlement into a form, effective to charge the appellees with liability for a total loss. It is enough, however, to say that, in so far as concorned the cargo underwriter at least, there was no act on his part, from first to last, indicative of ultimate ownership or disposition of the saved property by him or for his own account and no notice or suggestion, coming to him from the assured, that any such ownership was expected or to be tolerated. The "settlement," spoken of by Mr. Drummond, clearly related to petty details, such as freight and the like. It may be added that the freight settlement itself, by the terms of which the appellants were to bear the original freight charge and not the transshipment freight charge, was consistent with the idea that they were receiving so much of their cargo as was saved, upon the same footing as if it had encountered no disaster.

(8) The Atlantic policy itself provided (Exhibit 9, page 42) that "in case of partial loss by sea damage to dry "goods * * * the loss shall be ascertained by a separa- "tion and sale of the portion only of the contents of the "packages so damaged and not otherwise, and the same "practice shall obtain as to all other merchandise so far as "practicable." So, too, by the marginal clause, after a separate provision for silk, "each invoice of other goods "not less than $5,000, insured value, subject to separate "average as if separately insured, also, each invoice of "less than $5,000, subject to separate average if the "damage amounts to an average on $5,000." The sugar appears to have been subdivided into three separate invoices (Exhibits 1, 2 and 3, pages 38 and 39). Nor is

there any evidence tending to show, or any reason to suppose, that the goods, saved from a particular part of the vessel, were proportionately distributed among all the invoices. The presumption would be to the contrary, in favor of shipment of each invoice by itself.

(9.) Manifestly, the obstacles in the way of forcing upon the cargo underwriter an abandonment of the entire cargo would have been insurmountable, if such an abandonment had been attempted. It was not attempted, nor, in so far as appears, ever even suggested, between this underwriter and the appellants.

V. *The theory of constructive total loss, which prevailed with the District Court and was disapproved by the Circuit Court of Appeals, has no proper application to the present case.*

(1.) We are not aware of any adjudged case to the effect that there is total loss of profits where any part of the cargo has reached its port of destination in safety, without having been subjected to a lawful condemnation and sale at an intermediate port.

(2.) "On the whole, it does not seem that the rule of "constructive total loss of over fifty per cent. of the value "is applicable to a policy on profits in favor of the owner "of the goods under any circumstances." (2d Philips on Insurance, 3d Edition, 356.)

"Indeed, it may be remarked, in general, that as an "abandonment of the profits alone can pass nothing, it "is not easy to see that there can be any effectual aband-"onment of profits, or what would necessarily follow, "that an actual partial loss of profits can be made con-"structive total loss by abandonment. If a part of the "goods, the profits on which are insured, is lost, this is "necessarily a partial loss of the profits." (2d Parsons on Marine Insurance, 170). Waln *v.* Thompson (9 S. &

R., 115) is a leading authority to the same effect and was decided by the Supreme Court of Pennsylvania, of which State the appellees are citizens. In Thom *v.* Smith (3 Caines Rep., 245), the insurance was on profits, from Batavia to New York, valued at $6000. The vessel having been forced to bear away for St. Christopher's and having there become a constructive total loss and transshipment being forbidden by the laws of the place, the cargo was sold at the price it would have yielded in New York, and at a profit on the amount of the sales. The vessel came forward with the proceeds of sales, partly in bills of exchange, not collectible, and partly in products sold at a loss. The opinion of the Court was delivered by Judge Livingston who decided against recovery of any loss under the policy.

(3.) He was of opinion that abandonment was necessary under a profit policy, but did not put the case on that ground. Other authorities have doubted this necessity for, and only for, the reason that abandonment to the cargo underwriter would carry to the latter any right to profits, or, in other words, that ordinarily, such an abandonment might be of no practical value. In a case, however, where there has been no abandonment to cargo underwriter, or where the goods, or part of them, have actually come to the possession of the assured at the port of destination, the reason would seem to fall to the ground and the duty of prompt abandonment would seem to be in full force. In the present case we do not concede that there was any right of abandonment, but if there had been such a right, the absence of it was not excusable.

(4.) Reverting to the cargo itself, it has already been seen that there was no abandonment to the cargo underwriter.

(5.) That abandonment is necessary in all cases, where it is sought to convert a partial loss into a constructive

total loss, is so universally recognized that citation of authority for it would be superfluous. And with regard to the after-thought, that upon arrival at the port of destination the appellants received from their cargo underwriter the saved sugars in the character of purchasers from this underwriter, the language of Judge Livingston (Tom. *vs.* Smith, *supra*) is highly pertinent. He asks whether " as between the owner of cargo and his insurers " of profits, it is reasonable to permit the former to man- " age the property as he pleases and at a period ever so " distant to call on the latter for a total loss." Obviously, no such scheme as that of calling by another name the receipt of their goods by the appellants, at the port of destination, and settling with their cargo underwriter on the basis of partial loss, could operate against the appellees, even if the cargo underwriter had been a party to the scheme, which he evidently was not.

(6.) Moreover, if the cargo policy had been like the profit policy, an insurance against tolal loss only, and if it had contained none of the special provisions already quoted as to adjustment of partial losses under it, there could have been no right of abandonment of the cargo.

(7.) At times a singular confusion of ideas has arisen respecting the fifty per cent rule, as applied to cargo. Where there is liability, under a policy, for partial as well as for total loss, this rule has some support of convenience in the adjustment of the indisputable liability for loss. It would simply permit the assured to promptly realize his money, by debiting the underwriter with the total value and abandoning to him the right to what is saved, instead of postponing payment until the saving has been realized and can be deducted. The liability to abuse has been conceded, but the presumption has been entertained that the final result to the underwriter might be the same in whichever way the account was stated, violent as that presumption too often is in practice.

(8.) Where, however, the underwriter is by express stipulation liable for no partial loss whatever, the case is widely different, and it is a perversion of language to say that the loss of a major part is the loss of all, for the purpose of fastening upon the underwriter a liability which, by the written contract, he has been warranted against.

(9.) Professor Parsons has long occupied the position of the most eminent American authority upon the subject of marine insurance. In his note 4 to Section 2, Chapter 4, 2d Volume, the authorities are discussed with great fullness. And his conclusion is "that the effect of the words, "'partial loss excepted' or 'against total loss only' is to "exempt the underwriter from all loss but an actual total "loss" (page 118). Again in the text he says, "We are, "however, inclined to the opinion that the rule which "would not sanction an action under a policy, restricted "to a total loss by any of the many phrases which are "used for that purpose, unless the loss be total without "abandonment, rests on the weight of authority and on "the stronger reason' (pages 115, 116, and 117).

(10.) There is an undoubted distinction between cases where the voyage is broken up at a port of distress, under circumstances not requiring or admitting of transshipment of the cargo, and the cases where part of the cargo in fact reaches the port of destination, whether in the original vessel or through justifiable transshipment. With regard to this last class of cases, Professor Parsons says, "The rule of fifty per cent. does not, in our opinion, "apply, if any substantial part of the goods insured "arrives in safety at its destined port. Thus if, in course "of the voyage, the ship be stranded and relieved by jet-"tison of eighty per cent. of a shipment and the remain-"ing twenty per cent. arrives in safety, there can be no "converting of this partial loss inio a total loss by aban-

" donment, whether the contribution due would amount " to more than thirty per cent. or less. Nor can a loss of " part of the goods at the port of destination be made a " constructive total loss by abandonment, however large " that part may be " (page 159). As appears by note 3 (page 159), this question arose in the case of the " Paul Jones " and was referred for decision to Professor Par sons, Professor Greenleaf and Hon. Franklin Dexter of Boston, who unanimously decided in accordance with the statement of the text. So in Forbes *vs.* Manufacturers' Ins. Co. (1 Gray, 371), the Court is quoted as saying, " that after any considerable portion of the goods " insured (as in the present case 38 per cent. of the whole " amount of the number of boxes of teas) has arrived at " the port of destination and been landed in a perfect " state; the assured cannot then abandon and recover for " a total loss upon the ground of a loss of more than fifty " per cent. at some former period of the voyage."

(11.) Memorandum articles are by almost all authority put upon the old footing, that the saving of any material portion of them relieves the underwriter from liability. True, in some of the Massachusetts cases, a distinction has been taken between such of these articles as are perishable in their nature and others not supposed to be tainted with this inherent vice. But the distinction is not generally approved. The true ground of distinction, between memorandum and other articles, has been that the former were by the memorandum excepted from particular average or partial loss. This is the view taken by Professor Parson. And " Whatever may have been the motive to " the introduction of this clause in the politics of insurance, " which was done as early as the year 1749, and most " probably with the intention of protecting the insurers " against loss arising solely from the deterioration of the " article by its own perishable quality * * * it is well " conceded, at the present day, in respect to such articles

"that underwriters are free from all partial losses of every "kind, which do not arise from a contribution toward a "general average." (Biays *vs.* Ches. Ins. Co., 7 Cranch, 415. See also Hernandes *vs.* Sun Mut. Ins. Co., 6 Blatchford, C. C., Rep. 317; Saltus *vs.* Ocean Ins. Co., 14 John., 138; Washburn *vs.* Reliance Ins. Co., 82 Fed. Rep., 296; Morean v. U. S. Ins. Co., 1 Wheat., 219, and numerous other cases.) In other words, the exemption from constructive total loss, upon memorandum articles, depends upon the agreement that these articles shall be exempt and not upon the reasons for introducing the agreement into the policy. And although, in the present case, the exemption in the cargo policy was restricted to a percentage, yet the profit policy contained no such limit of restriction and thus comes within the line of decisions upon memorandum articles which are wholly free of particular average.

(12.) But the modern leading cases of Wallerstein *vs.* Columbian Ins. Co. (44 N. Y. 204) and Ins. Co. *vs.* Fogarty (19 Wallace, 640) may perhaps be regarded as decisive upon the point under discussion. In Wallerstein *vs.* Columbian Ins. Co., the insurance was upon coffee and wool and "free from particular average." The vessel, bound for New York, was driven onto the Jersey coast and there totally lost. At full tide, the water was over her main deck and submerged her cargo. A minor part of the wool was saved. The only saving of coffee was by dippers attached to long poles, and what was thus saved was of no value. There appears to have been no claim on the wool. With regard to the coffee, there was no entertainment of the idea that anything short of real total loss would suffice. But it was held that the saving of grains, which preserved the form of coffee but had no value as coffee, did not prevent the loss from being total. The finding of the jury, that the dipping up of these grains was a contrivance of the underwriter and not a salvage effort conducted in good faith, was approved. And Judge

Hunt, delivering the opinion of the Court, reached the conclusion that "the loss of the coffee was total and the right "to recover became fixed when the abandonment was made. "The rescue of a portion of the coffee, with whatever motives "it was done, did not undo what was already done. It could "not convert into a partial loss that which, under the cir- "cumstances detailed, the law adjudged total. It need "not be denied that many of the New York cases give "countenance to the doctrine contended for by the re- "spondent. I have endeavored to show that they may "be sustained without sustaining that doctrine." The Fogarty case cited and followed the Wallerstein case. The insurauce was on machinery from New York to Havana, free from particular average. The machinery consisted of numerous parts necessary for a complete sugar packing machine. When near Havana the vessel was driven on the rocks and filled with water and became a total wreck. All the machinery was of iron. About half of its weight was gotten up, and the remainder left at the bottom of the sea. The parts saved were broken and rusty and the cost of putting them in order, so as to be available for use, was greater than would have been the cost of a new machine. At Circuit, Judge Nelson directed the jury to find "whether any pieces or portion of the "machinery insured arrived at its destination in perfect "condition, so that it could have been used with its corre- "sponding or connecting pieces, had they also arrived in "good condition." In which case the loss would not be total. "But that if every piece of the machinery was so "damaged by the peril insured against as to be entirely "unfit for use on being supplied with its corresponding "or connecting pieces, then there was a total loss of the "subject insured as machinery, although the material "itself might still exist." And in this last case the verdict was to be for a total loss. A verdict for plaintiff was affirmed on Appeal to this Court. In an opinion delivered

by Mr. Justice Miller, the Wallerstein case is given as authority that "the extreme doctrine of an absolute ex- "tinction or destruction of the thing insured is not the "true doctrine, or at least is not applicable in all cases "as criterion of total loss" (page 645). If parts of the machinery "were absolutely lost, and every piece re- "covered had lost its adaptability to be used as parts of "the machine, had lost it so entirely that it would cost "as much to buy a new piece just like it as to repair or "adapt that one to the purpose, then there was a total "loss of machinery. If no piece recovered was of any "use, or could be applied to any use connected with the "machine of which it was a part, without more expense "on it than its original cost, then there was no part of "the machinery saved, however much of rusty iron may "have been taken from the wreck." The Wallerstein case might well perhaps have been planted wholly, as it was mainly, upon the fact that a fraudulent and unjustifiable rescue of worthless remnants is no saving of them in the eye of the law. The Fogarty case proceeded upon the theory that where machinery is the subject insured, remnants saved must be available for use in the proposed machine and must have some value for that purpose. It is enough, however, for our present purpose to call attention to the notable fact that neither case proceeded upon the idea, or admitted of the idea, that where a loss does not extend to at least totality of value, the underwriter, who has undertaken the risk against total loss only or with a warranty against average, can be charged with liability.

(13.) In Adams *vs.* McKenzie (13 C. B. N. S., 422), insurance was upon vessel, and in Greene *vs.* Pacific Mut. Ins. Co. (9 Allen, 217), it was on vessel and outfits and in Snow *vs.* Union Mut. Ins. Co. (119 Mass., 592, it was on vessel. So with Burt *vs.* Brewers' and Maltsters' Ins. Co. (78 N. Y., 400) and Carr *vs.* Ins. Co. (109 N. Y., 504).

And it ought not to be forgotten what little similitude there is between a vessel, as an entity incapable of subdivision for any purpose of use or sale, on the one hand, and cargo composed of separate articles, designed for separate use or sale and having no interdependence upon each other for either use or sale. With regard to Heebner *vs.* Ins. Co., it has been sufficiently discussed in the note of Professor Parsons, already referred to.

(14.) The practice of inserting the word "actual" before the words "total loss" has arisen from the desire for greater precision and for conservatism of the older and more rigid rule from its modification, or supposed modification, by the later authorities. Indeed, the Wallerstein decision has occasioned greater frequency in the introduction of this word "actual." When, however, it is observed that the farthest claim of both the Wallerstein and the Fogarty cases is to consider annihilation of value an equivalent of physical annihilation of the subject insured, and that neither case gave the least recognition to the moiety rule, under insurance against total loss only, it is clear that they are in consonance with the views of Professor Parsons above quoted. It is clear also that in the light of them exemption from total loss is precisely the same thing as exemption from actual total loss where any part of the value has been saved.

VI.—*The arguments, by virtue of which the appellants would appear to have persuaded themselves of the propriety of asserting their claim against the appellees, and which have been used in support of it throughout the litigation must be conceded to be sufficiently ingenious. In our humble judgment they are without merit or substance.*

(1.) The contention that the entire cargo and its appurtenant profits were destroyed by peril of the sea, in face

of the indisputable fact that over three hundred tons of this cargo, with whatever profits were appurtenant thereto, was not destroyed at all and reached the hands of the appellants at the port of destination, has been attempted to be disposed of in the foregoing points.

(2.) The contention that the appellees guaranteed to the appellants a surplus profit, over and above the profit included in the cargo policy, can find no aliment in any decided case or elementary authority. The two policies were in writing and each speaks for itself. There was no reference in either to the other. If the insured cargo had been wholly lost by a peril insured against, each underwriter would have been liable for the sum insured by him without reference to what was paid by the other. The valuation in the cargo policy was of the cargo as such, and, by the well established rules of marine insurance, would have been in no wise available either for or against the assured, with reference to an adjustment of the profit policy valued as such. It has been repeatedly so decided in the cases where there was a difference of valuation in different policies. Under the profit policy it did not matter (otherwise than upon a question of fraudulent valuation, if raised) how much the goods originally cost the appellants nor what was the basis of their reckoning of profits. The valuation closed the door to such an inquiry, so that under the Patapsco decision it would not have been competent for the profit underwriter to show that the hope of profits did not exist or had disappeared or had fallen far beneath the valuation.

(3.) The averment of the libel that on arrival at Montreal the saved sugars were worth "about $20,000" was unimportant for any purpose except as a confession that they had a value, and it was so treated by both parties. Nor did the phrase, "about $20,000," signify anything definite. Moreover, a simple sum in arithmetic, propor-

tioning this amount upon the original invoice cost (which is always the basis of calculation of profits) would of itself demonstrate a conceded profit upon the saved goods. The singular notion of substituting the valuation by the cargo policy, for the invoice cost, as the basis of calculation might sometimes work sad havoc with the rights of an assured. At any rate, it can be dismissed as unprecedented and groundless.

(4.) The contention that the profit on the saved sugars was eaten up, by salvage expenses, is also untenable. It is at war with the other theories of the appellants. They seek to use the cargo policy as the basis of reckoning profits, while, at the same time, they seek to throw it aside in the reckoning of what was saved. Granting that the profit underwriter had no right to interfere between the appellants and their cargo underwriter, or with the salvage efforts of either or both of them, it would seem to be clear that the profit underwriter is chargeable with no responsibility for, or by reason of, these efforts. On no other footing could the appellants excuse themselves from seasonable abandonment to the profit underwriter. The utmost that could be claimed, against the latter, was that he must await results and abide by them, if legitimately and fairly produced.

(5.) Indeed, this last contention involves the absurdity of charging the salvage expenses to each of the two underwriters and thus duplicating them for the purposes of the claim in suit.

(6.) The suggestion, rather than contention, that the saved goods arrived at Montreal in a somewhat damaged condition, is evidently arrived at by confusing the small parcel of twenty tons which had been wet with the main parcel of over three hundred tons which had never been damaged. True, the witness Drummond admits that, in what he calls his settlement with the cargo underwriter,

he made no claim for partial loss on the wet parcel, the meaning of which can only be that the bulk of the sugars was in such perfect condition, and of such value to him, that he was glad to take the whole into possession at the sacrifice of such a claim. The plain business significance of it can only have been that he regarded the dry sugars as of greater value than the cargo valuation of them. Though all this has no real importance upon the point under discussion, it nevertheless tends to dissipate the clouds from over it. We regret to discover a suggestion that the sound sugars were in some undefined way damaged by being mixed. The sacks bought for resacking purposes numbered only 200 (page 66), while the damaged sugars numbered about 800 sacks. Unquestionably the contents of the dry sacks (over 9,000) were never disturbed at all.

(7.) The contention that the profits were wholly annihilated by the original agreement with the salvors must fall within the same category. An award of half the saved goods, in full of their compensation as salvors, might have the arithmetical result to simply halve these saved goods and the profits on them. But the agreement was not carried out. The cargo underwriter prefereed to adjust the salvage in cash out of its own treasury, as was the case with the rest of the expense account. The original salvage agreement was thus superseded, and what went forward to Montreal was the whole and not the half.

(8.) The contention, that there was a virtual abandonment by the appellants to their cargo underwriter, has already been considered. It has no pretense of support except in the opinions or theories of Mr. Drummond, a deeply interested witness, who is unable to give any fact, or even fragment of conversation, to warrant these opinions. They are as clearly and purely constructive as the total loss for which he contends. They are in the teeth

of all the proven facts, including the adjustment of loss recorded on the cargo policy. Even if, however, such a form or name had been given to the transaction, it could by no possibility have altered the fact that the sugars did reach the appellants and were accepted by them upon the basis of a partial loss adjustment. Assuredly such a device, if it had been put in practice, could not have been operative, in a court of equity, to prejudice the position of the appellees.

(9.) In the same connection, it is to be noticed that the scene of wreck was within easy reach of Montreal, off the mouth of the St. Lawrence River; that the salvage efforts proper were under direction of the master of the vessel; that nothing remained to be done by the appellants and their cargo underwriter, or either of them, excepting to settle with the salvors and forward the cargo to Montreal; that even this was done in consultation with, and with the approval of, the master; and that throughout this period the appellants and their cargo underwriter were in regular communication by letter and telegram. It is further to be noticed that not the slightest idea of abandonment was intimated, or is pretended to have been intimated, between the two. The sugars therefore reached their destination unabandoned and undeniably subject to the right of the appellants to insist upon delivery to themselves. It is not conceded that even as to the cargo underwriter there was a right of abandonment. But supposing such a right to have existed, it was for the appellants to elect whether to exercise it or not. Therefore, when the sugars arrived at Montreal, they were the property of the appellants, who, upon any construction of the cargo policy, could refuse to abandon. It is unnecessary to add that, by all authority, there could be no election to abandon after such arrival.

(10.) The contention, that the profit underwriter was

not entitled to an abandonment, has been already referred to. The attempt in the present case, however, is to stretch it to the extremity of enabling the appellants to receive and enjoy a substantial part of the subject of insurance and afterwards recover for a total loss of this subject, and to do this, moreover, without abandonment to anybody.

(11.) The contention, that there is any likeness between merchandise such as the sugar in question and the charter of a vessel, hardly needs to be discussed.

(12.) In short, all the struggles of the appellants to justify their claim revolve about one central notion, that the delivery to them at the port of destination, in safety and in good condition, of a portion of their cargo can, in some way, be treated as not having occurred and that the Courts, in the establishment of equitable principles, have built up a system under which, by some process of ratiocination or construction, this controlling and indisputable fact can be judged to be a nullity.

VII.—*Upon the case as it stands, and in the light of the principles and adjudications which bear upon it, we respectfully submit that the judgment of the Circuit Court of Appeals is correct and should be affirmed.*

CLIFFORD A. HAND,
Of Counsel for Appellees.